ATTITUDE OF FOREIGN COUNTRIES TOWARD LIABILITY AND COMPENSATION

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It would be idle at this late date to attempt to present in detail the facts in connection with European legislation concerning accident liability and workmen's compensation. The United States Government in various reports has presented in full the laws in various foreign countries dealing with these important topics. Text-books and magazine articles, which have appeared from time to time, amply cover the subject and give fully the basic information necessary for the comprehensive understanding of the attitude in Europe.

All that can be attempted at this time is a presentation of the philosophy of the movement in Europe, which has been going on for over twenty-five years, and which even to-day is in an embryonic state in several countries. In fact, a study of the laws themselves would be apt to lead the student astray. One might be apt to conclude that there is no consensus of opinion regarding the final development of legislation, and that some of the chaos existing in the United States is still to be found across the ocean.

This, however, is not the case. A clear conception of what Europe stands for in the matter of legislation regarding accident liability and workmen's compensation is to be gathered from the proceedings of the various International Congresses on Social Insurance, which have been held during the last twenty-five years. In fact, the change of name in this organization indicates to some extent the general trend of legislation and of the wishes and desires of those who are sponsors for it. Originally, the congress was called the International Congress on Work Accidents. To-day the term, "International Congress on Social Insurance," more aptly expresses the purposes and aims for which the congress stands.

In substance, the underlying principles of legislation, as exemplified in Germany and to lesser extent in other countries, assume that the American doctrine of liability is false. While this doctrine

may have been valid at earlier times, to-day under the complex forms in which industry is found, it is not only unwise but unjust to hold the workman responsible for accidents which may occur to him, on the assumption that he is a free agent and has the right of choice in his work. European legislation has taken the entirely contrary attitude of assuming that accidents in the majority are traceable to causes inherent in industry, and that as a result industry should be held responsible for them. It is immaterial whether this conception has been extended to the ultimate thought of holding industry responsible for all accidents, or, for a limited number, as is the case in certain countries, where deliberate negligence on the part of the workman absolves the employer from liability. The vital thought to be brought out here is the recognition, not of liability on the part of either the employer or employee, but rather the more progressive concept that since accidents do occur and may continue to occur, notwithstanding all provisions for safeguarding, the doctrine of compensation should be established. In the last analysis this means that the consumer shall bear the burden.

Nor is it vital for the acceptance of this doctrine that the theory of compulsory compensation shall be introduced. While the recent decision of the Court of Appeals of New York proclaims with emphasis the mature deliberation of a unanimous court, that under our constitutional provisions any attempt at compulsory compensation infringes on the right accorded to individuals under the Constitution, that property may not be taken from them without due process of law, it does not follow that the conception of a compulsory principle may not voluntarily be assumed by industry. In fact, it seems evident that if this far-reaching decision of the Court of Appeals will hold, enlightened manufacturers will realize not only the desirability, but the necessity of making provision for indemnifying employees, who may become injured in the pursuit of their employment. This tendency is already apparent in many states and in many industries, and its growth is only a matter of time.

On the assumption that compensation is the logical development, in preference to the older theory of liability which, *per se*, involves a suggestion of tort, it follows that in granting compensation, a second principle suggests itself. This, too, has been exemplified in the main in European legislation. I refer to the granting in cases of accidents not to a lump sum compensation, but rather to the

provision which has been made in many instances for the care of the injured workmen during illness attending accident or for the granting of an invalidity pension should the injuries from the accident become permanent. This thought has been carried to its highest conclusion in Germany, where the principle of pension has been extended not only to the permanently injured workmen, but to the granting of pensions to the widow and orphans in case of the death of the workman resulting from injury.

The purpose of this provision is clear. The old liability theory assumes the necessity for indemnity, and as a result in the past this indemnity has been measured on a money basis. The compensation theory, on the other hand, while it involves a theory or principle of indemnity, adds a finer, better principle, namely: that of replacement. In other words, it is the intent of legislation of this kind not merely to give to dependents a cash consideration for the loss which has been suffered in the maiming or death of one who is frequently the principal wage-earner, but rather to attempt to replace in the family the earning ability, which, under normal circumstances, would probably have been continued for an indefinite period.

The question will naturally arise: Can the cost of such permanent or continuous pensions be borne by the individual employer? The answer can be made off-hand in the negative. Realizing this, however, it has been the effort on the part of European legislation to provide for the regular and continuous payments of pensions, by requiring the employer to guarantee payments through some insurance provision. The weakness of some of the legislation proposed in the United States and the weakness of the English legislation may, in part, be traced to the absence of such provisions. Accident, like death, may be looked upon as a contingency and risk of life, and its frequency may to-day be measured in terms of actual experience. While the laws, which govern accident, cannot be estimated with the finality which underlies the laws of a mortality table, nevertheless there is sufficient statistical data to estimate with a fair degree of accuracy the costs of accidents upon which insurance rates can be based. If proper protection is to be given not only to the workman but to the employer, any sane scheme of compensation should have attached to it an insurance provision.

Still another thought is characteristic of most foreign legislation. It is mentioned here for the reason that it has not received

definite acceptance either in England or in the United States. I refer to the belief that if industry is to be held liable for accidents, with possibly certain limited exceptions, then the amount of such liability likewise must be limited. Any well-grounded compensation scheme must assume in advance that industry cannot be subjected either to the whims of juries or to sentimental considerations. All that industry should be expected to do is conveyed in the thought outlined above, namely: to attempt to replace for definite periods of time, at least in part, the contribution which the injured workman would have made for the support of his family. These amounts, since they are based on wages, can be definitely calculated and form part of any well-planned insurance scheme.

Finally, it should be distinctly recognized in the United States that compensation for accidents is only one phase of a broader and larger movement directed towards the protection of workmen against the risks of industry. Industrial accidents have been given prominence in legislation of all countries, for the reason that they are sudden and that their immediate effects are frequently serious. It will probably be demonstrated eventually, as a matter of fact, that the other risks to which industry subjects workmen are equally as serious and probably affect larger numbers of workmen. It is recognized to-day, equally in Europe and to a lesser extent and more recently in the United States, that many diseases are the result of bad industrial conditions or to the strain and tension to which workmen are subjected. Similarly, the disability of workmen occurring prematurely, long before they have reached the allotted three score and ten, can be traced to the effects of long hours of employment, overwork, strain, etc. Here, too, foreign legislation has taken the attitude that protection should be given to workmen against these contingencies. It should be mentioned here again that this protection need not necessarily convey any idea of liability on the part of the employer or of the industry. Instead, there is the general assumption that there are risks and contingencies which arise in industry and against which the individual workman deserves protection.

It is only a further extension of this thought to maintain that since the individual workman himself is really not in a position to protect himself, the greater part, if not all of the burden, should be borne by the employer—or, even as the thought is extended in

certain countries, that the state, as a matter of wise public policy, might assume a portion of this obligation.

I think it necessary that this idea should be strongly emphasized here, if we are to develop accident legislation in the United States along safe lines. If we are to benefit by the experience of our foreign neighbors, we must agree with them that we have only partially done our duty in making provision for workmen against industrial accidents. A comprehensive scheme of insurance for workingmen must include insurance against sickness, against temporary or permanent invalidity and against death. To what extent industry shall be chargeable with the cost of this protection, what amount the employee should pay and whether the state should or should not be one of the contributing parties, is immaterial for this discussion. It is, however, essential that we shall recognize at the outset of all attempts to bring about a change of affairs in our state legislation, the fundamental principles above adverted to. When these are clearly recognized and understood, it should in time be possible to effect rational and even uniform legislation, which shall not be in conflict with our constitutional provisions. When it appears probable that there is a unanimity and consensus of opinion as to the introduction of these fundamental principles into our legislation, it will probably be a comparatively simple matter, should it be necessary, and this is still in doubt, to amend the constitutional provisions which to-day apparently stand in the way of legislation. This thought, we believe, crystallizes the opinion of modern men and women on the question of necessary protection for those who prosecute the industries of this country.